Supreme Court, U.S.
FILED

04 449 SEP 30 2004

OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

MICHAEL DAVID LAMONT, JR.,

Petitioner,

v.

CHRISTINE AND PATRICK O'DONNELL,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Oregon

PETITION FOR WRIT OF CERTIORARI

PHILIP FREDERICK SCHUSTER, II
Counsel of Record
ROGER FREDRICK DIERKING
DIERKING & SCHUSTER
3565 NE Broadway
Portland, OR 97232
(503) 335-7765

September 30, 2004

QUESTIONS PRESENTED

1. To what extent can a State, consistent with the federal Due Process Clause, inject itself and third parties into the nuclear family by applying a private, third-party "psychological parent" statute to deprive an otherwise fit custodial parent of custody of his or her children?

2. In "psychological parent" custody adjudications, what weight must trial courts accord the child-rearing decisions of a fit custodial parent which are consistent with the best interests of the children ?

3. Does the application of a state statute, which allows a private third party to deprive a fit custodial parent of custody, absent a heightened showing of extraordinary or exceptional circumstances, violate that fit parent's guarantee to Due Process under the Fourteenth Amendment to the US Constitution?

PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The respondent in the circuit court case was the appellant in the Court of Appeals of the State of Oregon and the respondent on review in the Supreme Court of the State of Oregon. The named respondent in the original court case was Michael David Lamont, Jr.

The intervenors in the circuit court case were the respondents in the Court of Appeals of the State of Oregon and the petitioners on review to the Supreme Court of the State of Oregon. The named intervenors in the circuit court case were Christine and Patrick O' Donnell.

The petitioner in the circuit court case, the Court of Appeals cases and the Supreme Court case was Rayne Elizabeth O'Donnell-Lamont (deceased).

The intervenor in the circuit court case was an intervenor-respondent in the Court of Appeals of the State of Oregon and an intervenor-respondent in the Supreme Court of the State of Oregon, but did not cross-appeal from the circuit court decision denying him visitation rights.

Darcia Krause, attorney, and Basic Rights of Oregon, Inc. appeared *amicus curiae* before the Supreme Court of the State of Oregon on intervenor's petition for review.

TABLE OF CONTENTS

Questions Presented i

Parties to the Proceedings in the Court Below ii

Appendices v

Table of Authorities vi

Brief 1

Opinions Below 1

Jurisdiction 1

Constitutional and Statutory Provisions Involved 2

Statement of Case. 2

Reasons for Granting Writ 9

I. Introduction. 9

II The Court should resolve the conflict between this Oregon custody decision and the *Troxel* visitation decision, to decide what weight is to be given to the child-rearing decisions of a fit custodial parent which are consistent with the child's best interest 12

III To secure and stabilize parental rights and relationships with children in third-party custody cases, this Court should supplement

the *Troxel* standard with the dominant opinion and contemporary practices of the fifty states, which require either a showing of unfitness or a showing of exceptional or extraordinary circumstances detrimental to the child to rebut the *Troxel* parental presumption 21

Conclusion 30

APPENDICES

Appendix A: Opinion of the Oregon Supreme Court . . . . . App A-1-42

Appendix B: Judgment Re Custody, Parenting Time and Third-party Visitation AppB-1-24

Appendix C: Supplemental Judgment; Money Judgment . . . . . App C-1-5

Appendix D: Opinion of the Oregon Court of Appeals . . . . . App D-1-13

Appendix E: Opinion of the Oregon Court of Appeals on Reconsideration . . . . . App E-1-20

Appendix F: Order of the Oregon Supreme Court Denying Petition for Reconsideration . . . . App F-1-2

Appendix G: Constitutional and Statutory Provisions . . . . . App G-1-8

Appendix H: 50-State Survey - Excerpt from Father's Brief on Merits to Oregon Supreme Court . . . . . App H-1-5

Appendix I: Excerpts from trial and state appellate court record . . . . . App I-1-8

TABLE OF AUTHORITIES

Addington v. Texas, 441 US 418, 423, 431-432 (1979), ... 26

Clark v. Wade, 544 SE 2nd 99, 107-108 (Ga 2001) .. 24

Connecticut v Doehr, 501 US 1, 23 (1991) 26

Dodge v Graville, 533 US 945 (2001) 12

Elk Grove Unified School District v. Newdow at. al. 542 US ___, 124 S Ct 2301, 2309 (2004). 9

Mathews v. Eldridge, 424 US 319, 335 (1976) 23, 24,28

O'Donnell v. Lamont, 337 Or 86, 91 P 3rd 721 (2004) 1

O'Donnell v. Lamont, on recons. 187 Or App 14, 67 P 3rd 939 (2003) 1

O'Donnell v. Lamont, 184 Or App 249, 56 P 3rd 929 (2002) 1

Quilloin v. Walcott, 434 US 246, 255 (1978) ... 25,29

Reno v. Flores, 507 US 292, 302, 304 (1993). 13,29

Rivera v. Minnich, 483 US 574, 578 (1987) 26

Santoski v Kramer, 455 US 745, 749-750, 756 (1982) 25,26

Sleeper and Sleeper, 328 Or 504, 511, 982 P 2nd 1126 (1999). 3

Stanley v. Illinois 405 US 645, 651-652, 656-657 (1972) 9,23

Troxel v. Granville, 530 US 57 (2000) ..... passim

CONSTITUTION:

Fourteenth Amendment to the United States Constitution 1,9

STATUTES:

28 USC § 1257 (a).. 1

ORS 109.119 6

former ORS 109.119 (1997 Edition) 2,3,4

current ORS 109.119 7,9,11,14,15,23,28

current ORS 109.119 (2001 Edition) 2,6

current ORS 109.119 (2) (a) (b) 10,12,14,16,17

current ORS 109.119 (3) (a) (b) 17

current ORS 109.119 (3) (b) (10) (e) 16

current ORS 109.119 (3) (a) (4) (b) 9

current ORS 109.119 (4) (b) (A) (B) (C) (D) (E)
..... 7,8,11,16,22,23,24

current ORS 109.119 (4) (b) (C) (10) (a) (b) 8,17

current ORS 109.119 (10) (a) 11,23

current ORS 109.113 (3) (a) 23

current ORS 109.119 (3) (a) (10) (a) 16

MISCELLANEOUS

Schuster II, Philip F., "Constitutional and Family Law Implications of the *Sleeper* and *Troxel* Cases: A Dénouement for Oregon's Psychological Parent Statute?" 36 *Will. L. Rev.* 549 (2000; published 2001, hereinafter 36 Will. L. Rev.) 16,23

Petitioner, Michael David Lamont, Jr., respectfully requests that a Writ of Certiorari issue to review the judgment and opinion of the Supreme Court of the State of Oregon and that court's Order Denying Petition for Reconsideration entered on July 27, 2004.

OPINIONS BELOW

The order of the Supreme Court of the State of Oregon denying Petition for Reconsideration is reported at 2004 Or LEXIS 519 (2004) and is reprinted in Appendix F hereto. The opinion of the Oregon Supreme Court is reported at 337 Or 86, 91 P 3rd 721 (2004), and is reprinted in Appendix A hereto.

The opinion of the Oregon Court of Appeals on Reconsideration is reported at 187 Or App 14, 67 P 3rd 939 (2003), and is reprinted in Appendix E hereto. The first opinion of the Oregon Court of Appeals is reported at 184 Or App 249, 56 P 3rd 929 (2002), and is reprinted in Appendix D hereto.

The Judgment Re Custody, Parenting Time and Third-Party Visitation, as well as the Supplemental Judgment: Money Judgment, entered in the Circuit Court of the State of Oregon for the County of Washington (Steven L. Price, Judge), have not been reported. They are reprinted in Exhibits B and C, respectively, hereto.

JURISDICTION

The Supreme Court of the State of Oregon filed its opinion on June 10, 2004, and entered an order denying petitioner's petition for reconsideration on July 27, 2004. This Court has jurisdiction under 28 USC § 1257 (a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth Amendment to the United States Constitution, and the "psychological parent" statute of the state of Oregon, former ORS 109.119 (1997 Edition), now current ORS 109.119 (2001 Edition), are set forth in Appendix G, hereto.

STATEMENT OF THE CASE

Petitioner (hereinafter "father") and petitioner below (hereinafter, "mother") were married in December 1991 and had two children, Taryn, born in September 1992 and Seaira, born in January 1996. Father and mother were divorced effective September 1998 and mother was awarded custody of the two children. App D-2,3

In March 1999, mother died from a preexisting heart condition after which father agreed to allow his two children to stay with respondents, the maternal grandparents (hereinafter "grandparents"). App D-3. Unable to agree on permanent arrangements for the children, father reasserted his right to custody of the children.

In July, 1999, grandparents sought and were later granted intervenor status in the dissolution proceeding as parties who had established a statutory child-parent relationship with the two minor children. App D-3,4. Grandparents initially obtained an *ex parte* order awarding them custody. The court ordered the children returned to father, who agreed that he would keep them in the Salem, Oregon area. App D-3,4. Father moved with the children to Montana for a brief six week period (Findings 31 and 32; App B-7,8), but returned the children to Oregon when ordered by the trial court to do so. App D-4. Upon returning to Oregon, father, his domestic associate and the children lived first on the paternal

grandfather's property in Mill City, then moved to a house in Lyons, Oregon. App A-5; App D-4. They lived there with the children through the trial court hearing in May, 2000 (App B-1), and on through the trial court's letter of opinion issued in July, 2000 (App D-4).

Father had physical custody of his children from July 1999 until custody was transferred to grandparents at the beginning of the school year in September, 2000, prior to the entry of the trial court order in December, 2000. App B-6,15,23.

Following the trial court ruling awarding custody to grandparents, the trial court awarded grandparents a judgment for attorney fees and costs in the sum of $8,875, due and payable on March 29, 2001, plus interest accruing at the rate of 9% per annum on any unpaid balance. App C-4.

During the trial court case, father did not challenge the facial constitutionality of the custodial standard of former ORS 109.119 (1997 Edition). App G-5-8. Rather, father raised an "as applied" constitutional challenge, arguing that as the "natural parent" he had "supervening rights which include the right to uninterrupted custody absent a showing that he is unfit, abusive, neglectful, or has abandoned his children." App I -1. During closing argument, father's counsel asserted that until father was found to be unfit, "it's our contention that we don't even get to the best interest threshold.... My client is the dad.... He...has the right to say where the kids go absent a revocation of those rights." App I-1,2. Father urged the trial court to apply father's "supervening right", following the Oregon Supreme Court's decision in *Sleeper and Sleeper*, 328 Or 504,511, 982 P 2nd 1126 (1999); App I-2.

The trial court addressed the impact of this Court's decision in *Troxel v. Granville,* 530 US 57 (2000), which was decided after the trial court hearing but before the trial court opinion. App A-9.

The trial court found, *inter alia,* that "[a]ll of the

dangers that father presented at Mother's death are still there. These circumstances present sufficient threat of harm to the children to defeat whatever supervening right Father may have as a biological parent." (Finding 42) App B-10

The trial court, in awarding custody of father's two children to grandparents, concluded that it had properly applied the presumption to which father was entitled, but nevertheless determined that it would be in the best interest of the children to award custody to grandparents under former ORS 109.119 (1997 Edition). App A-9,10; App D-4 (note 3).

Father filed a timely appeal. A three judge panel of the Oregon Court of Appeals reversed the trial court's decision, taking guidance from this Court's decision in *Troxel* that "the Due Process Clause of the Fourteenth Amendment protects the fundamental rights of parents to make decisions concerning the care, custody and control of their children.' 530 US at 66." (App D-6). The appellate court noted that this fundamental right "requires an even stronger showing than ordering visitation over the parent's objection." App D-7 (note 7).

The test fashioned by the Court of Appeals under former ORS 109.119 (1997 Edition), was that grandparents must establish "that the evidence as a whole preponderates in their favor...that father cannot or will not provide adequate love and care for the children or that placement of the children in father's custody will cause them undue physical or psychological harm." App D-9. The appellate court held that grandparents had failed to meet this test. App D-13.

In awarding father custody under this custodial standard, the Court of Appeals gave little weight to the report and testimony of the custody evaluator who "focused exclusively on the best interest of the children without regard to father's fundamental right to their care, custody and control...." The Court of Appeals concluded that "the trial court did not evaluate the effect of father's parenting on the children by itself...." App D-10 (note 9).

The Court of Appeals focused on father's decisions impacting the care, custody and control of his two children primarily when he had physical custody of his children from July 1999 through July 2000. The appellate court, on *de novo* review, made the following findings of fact:

(1) Father was actively involved with the children's care and upbringing before mother's death both before and after the divorce. App D-11;

(2) Although his employment often kept him away from home, father's involvement with his children increased after their mother's death. App D-11;

(3) During the time father had custody, he was employed with well-paying jobs; father's employer testified that father was a good worker and that he allowed time off from work to attend to his children's needs. App D-11;

(4) During the time father had custody, he enrolled the older child in school. The child's first grade teacher testified that the child was doing well in school and had no emotional or behavioral problems. App D-11;

(5) During the time father had custody, father enrolled the younger child in an appropriate day-care program and both children did well while in father's custody. App D-11;

(6) While father had custody, he arranged for appropriate counseling to help the children resolve the grief issues arising from their mother's death. App D-12-13;

(7) Independent witnesses, including two police officers, testified that while father had custody of his children, neither his family nor his girlfriend exhibited any anger or drug use problems nor any problems with abnormal or inappropriate actions with the children; father did not pose any danger to his children. App D-12;

(8) The expert psychological testing did not suggest that

father is violent or abusive, despite more remote incidences of conflict with mother. App D-12.

While father's lack of candor with the court was of concern, neither that nor his move to Montana were decisive factors in the Court of Appeal's decision to reverse the trial court. App D-2 (note 2), 11.

Grandparents filed a timely petition for reconsideration. On reconsideration, the Court of Appeals, in a deeply divided opinion, held that the 2001 amendments to ORS 109.119 were fully retroactive and applied to the facts of this case. App E-2 The prior opinion was modified accordingly and adhered to as modified by an equally divided court. Grandparents' request for remand was denied by an equally divided court. App E-2.

Grandparents then filed a timely petition for review to the Oregon Supreme Court which was granted. In his Brief on the Merits before the Oregon Supreme Court, father argued that federal Due Process requires a rebuttal standard as well as a "high threshold showing of either unfitness or extraordinary circumstances...." (App H-2). Father argued for a showing that the parent "will harm the child" (App A-22), and for a showing of a relevant *nexus* between any of the remaining non-exclusive rebuttal factors and either unfitness or harm to the child. App I-2,3.

On *de novo* review of the record, the Oregon Supreme Court reversed the two decisions of the Court of Appeals and affirmed the judgment of the trial court, pursuant to current ORS 109.119 (2001 Edition), awarding custody of the children to grandparents. App A-2,3.

The Oregon Supreme Court rejected father's constitutional arguments (App A-40,41), as well as the contention that because father's liberty interest is fundamental, courts must apply heightened scrutiny in third-party custody

cases. App A-17. The Oregon court noted that this Court's *Troxel* decision made it "difficult to identify the scope of the parental rights protected by the Due Process Clause or the showing that the state or a nonparent must make before a court may interfere with a parent's custody or control of a child." App A-16.

The Oregon Supreme Court concluded that this Court's *Troxel* decision "declined to address the so called 'harm' standard, and that it also failed to articulate an 'inadequate care' requirement". App A-41. The Oregon court characterized father's fundamental Due Process right as "important, but limited." App A-41. The Oregon Supreme Court concluded that its decision and the Oregon legislature's statutory "*Troxel* fix" (current ORS 109.119) sufficiently adhered to *Troxel*'s mandate to require a "state to give 'some special weight' to the interest of a parent in decisions regarding a child." App A -41.

Notwithstanding this decision, the Oregon Supreme Court (App A-29-30), as did the Court of Appeals (App D-10) and the trial court (Finding 40; App B-9), all found that father was a "fit" parent — "that grandparents have not shown father is 'unwilling or unable to care adequately' for the children." App A-30. See, statutory rebuttal factor at current ORS 109.119 (4) (b) (A). App A-29. The Oregon Supreme Court also found that father had encouraged a close relationship with his children and their grandparents, pursuant to current ORS 109.119 (4) (b) (D). App A-35,36.

Because grandparents cared for the children during March of 1999 — more than a year prior to the trial court hearing — the Oregon Supreme Court found that grandparents "recently had been the children's caretakers," pursuant to the rebuttal factor at current ORS 109.119 (4) (b) (B). App A-30-31.

Next, because of father's move to Montana, the Oregon

court found that father had unreasonably denied or limited contact with grandparents, under the rebuttal factor at current ORS 109.119 (4) (b) (E). App A-36, 37.

Most importantly, because of father's alleged "lack of understanding of the children's emotional and developmental needs, his difficulty in controlling his own anger, his lack of insight"...[his failure] "to recognize the emotional attachment that his children have to grandparents... or the impact on the children of the family's changes of residence," together with his girlfriend's alleged "deficiencies as a caregiver, and father's complete failure to acknowledge any of them", the Oregon Supreme Court found that father posed a "serious risk" of psychological or emotional harm to his children. App A-33 Prior to making this finding of harm, the court applied the rebuttal factor at current ORS 109.119 (4) (b) (C) (10) (b), but fashioned a new, heightened "serious present risk of harm" standard. App A-32,33 (emphasis added).

The Oregon Supreme Court agreed with the trial court's finding that "'[f]ather's conduct convinces me that he will remove his children from this area if possible and do all he can to eliminate contact between the children and the Grandparents'". App A-36.

Lastly, the Oregon Supreme Court developed a simple "consider[ation of] all the evidence" test — "whether the evidence as a whole is sufficient to overcome the presumption that the parent acts in the best interest of the child." App A-28,38. Under this test — and notwithstanding father was found to be a fit parent — the Oregon Supreme Court found that the evidence "as a whole" overcame the *Troxel* presumption. The Oregon Supreme Court then summarily agreed with the trial court that the children's best interest would be best served by awarding custody to grandparents. App A-38-39.

Father filed a timely petition for reconsideration of the Oregon Supreme Court's decision. The petition for

reconsideration raised three substantial federal questions.

First, father asserted that the Oregon Supreme Court's decision, contrary to his federal Due Process guarantees, applied current ORS 109.119 to deprive him — an otherwise fit legal parent, who had physical custody of his children for more than a year prior to the custody hearing — of his children. App I-3-5.

Secondly, father asserted that the Oregon court's application of a simple "totality of evidence" test, deprived father of his federal Due Process guarantees. App I-5. Father argued that where a parent is found to be "fit", federal Due Process requires a heightened rebuttal showing of "extraordinary or exceptional circumstances." App I-7,8.

Third, father asserted that the Oregon Supreme Court's decision, in reviewing the record *de novo*, shifted the burden of proof and persuasion onto an otherwise fit custodial parent, contrary to the *Troxel* holding and Due Process guarantees of the Fourteenth Amendment to the United States Constitution. App I-5,6.

The Oregon Supreme Court denied father's Petition for Reconsideration on July 27, 2004. App F-2.

REASONS FOR GRANTING THE WRIT

I. INTRODUCTION

This petition requests the Court's intervention and review of a pivotal Oregon family law case because "a substantial federal question...transcends or exists apart from the family law issue...." See *Elk Grove Unified School District v. Newdow at. al.* 542 US ___, 124 S Ct 2301, 2309 (2004). Father's "interest in retaining custody of his children is cognizable and substantial." *Stanley v. Illinois*, 405 US 645, 652 (1972)

The substantial federal question arises from flawed

methodology applied by the Oregon Supreme Court in weighing the evidence to determine whether the statutory parental presumption at current ORS 109.119 (2) (a) (App G-1) — that a legal parent acts in the child's best interest — has been rebutted. Misapplication of the *Troxel* methodology resulted in an award of custody of an otherwise fit custodial parent's children to a private third-party. The Oregon court's second-guessing of this fit custodial father's child-rearing decisions falls far short of this Court's admonition in *Troxel* to elaborate with care third-party custody and visitation standards.

In this case, the trial court terminated father's custody after his children had received parental care, support and direction fully meeting their needs. More significantly, the children demonstrated no emotional or behavioral problems while in their father's custody or from the separation from their grandparents during their six-week stay in Montana. App D-11-12

The Oregon trial court and Supreme Court fact-finding processes fail to pass constitutional muster in the context of *Troxel* and other case holdings of this Court.

One example of this failure and of the conflict and stress now placed upon the children and their parents is illustrated where a fit custodial parent has need to move in order to support his or her family. App A-4. These moves may now be second-guessed by judges (and by third parties: App A-33) who, for their own reasons, feel that such moves are "abrupt and undertaken with minimal planning or consideration of the interests of the children." App A-35

A fit parent's choice of a domestic partner may also be second-guessed by judges (and by third parties: App A-32) who, for their own reasons, feel that the parent "has too rapidly secured an unproven partner, with many similar issues, in an effort to set up a home for the children." Finding 41; App B-9

The *Troxel* plurality opinion, with Justice Thomas

concurring, held that the Washington visitation statute "as applied" [to the parent] and her family...unconstitutionally infringes on [a] fundamental parental right". *Supra* 530 US at 67 (bracketed matter and emphasis added). Rather than deciding this case based upon the statute's facial unconstitutionality, *cf. supra* 530 US at 75-79 (Souter J., concurring), this Court held that the case turned upon "the specific manner in which that [visitation] standard is applied...." *Supra* 530 US at 73 (bracketed matter added). The same analysis pertains to this case.

The 2001 Oregon Legislative Assembly enacted a constitutional "*Troxel* fix" to Oregon's psychological parent statute at current ORS 109.119. App G-1-5. The statute authorizes any third-party who establishes a child-parent relationship, current ORS 109.119 (10) (a), to request — and a judge to award — custody whenever the court properly finds by a preponderance of evidence that the parent has failed to make child-rearing decisions in the child's best interest.

The Oregon statute's five non-exclusive substantive rebuttal standards are set forth at current ORS 109.119 (4) (b) App G-3

However, the Oregon Supreme Court's application of the Oregon "psychological parent" statute radically departs from this Court's guidance given in *Troxel*: state trial courts must give special, significant or material weight to a fit parent's child-rearing decisions by making more than "slender findings" and must also give additional weight to a fit custodial parent's decisions by allocating the burden of proof and persuasion onto the third-party, rather than the fit parent. *Supra* 530 US at 72.

The Oregon Supreme Court concluded that the Due Process right that this Court "affirmed in *Troxel* is important, but limited:...." App A-41. Much of the Oregon court's analysis focused upon the statutory rebuttal criteria at current ORS 109.119 (4) (b), and how the "evidence will vary." App

A-27. Most troublesome is that no analysis was made of the Court of Appeals' earlier findings relating to father's child-rearing decisions (App D-11-13) — the findings which give shape and substance to the *Troxel* presumption itself.[1] Current ORS 109.119 (2) (a). See, *Troxel*, 530 US at 71-72 (discussing findings regarding the parent's visitation decisions.) The Oregon court failed to give any of this fit custodial father's child-rearing decisions any special weight whatsoever.

Guidance by this Court is needed to give state courts a clear road map in private third-party custody adjudications: What weight is to be given to findings regarding a fit custodial parent's child-rearing decisions? What minimum burden of proof is constitutionally required to rebut the parental presumption? What type of showing or evidence is necessary to overcome the parental presumption where the legal parent has been found to be a fit custodial parent?

Previously, where a state court has failed to accord special weight to the decisions of a fit parent, this Court has granted certiorari, vacated the judgment and remanded to the state court for further consideration in light of *Troxel v Granville*, 530 US 57 (2000). See, eg., *Dodge v Graville*, 533 US 945 (2001). The weightier parental interest implicated in a private third-party custodial adjudication requires no less diligence to insure that a state court decision does not radically depart from this Court's *Troxel* holding, especially where that state's decision accords a fit custodial parent's child-rearing decisions no special weight.

II. The Court should resolve the conflict between this Oregon custody decision and the *Troxel* visitation decision, to decide what weight is to be given to the

---

1 See, Oregon Court of Appeals findings of fact discussed, supra at pp 5-6

child-rearing decisions of a fit custodial parent which are consistent with the child's best interest.

In *Troxel v. Granville*, 530 US 57 (2000), this Court's plurality opinion held that "fitness" means "adequately car[ing] for his or her children." *Supra* 530 US at 68. The plurality opinion states "that there is a presumption that fit parents act in the best interest of their children." Where a parent is found to be fit, "there will be normally be no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children." (citing *Reno v. Flores*, 507 US at 304). *Troxel, supra* 530 US 68-69. *Troxel* was a visitation case where the parent was found to be fit; this is a custody case involving a fit parent. The fact that this custodial father was found to be a fit parent of his children is an important fact and gives the *Troxel* presumption additional weight and force.

Generally, a child may not be "removed from the custody of its parents so long as they [are] providing for the child *adequately*." *Reno v. Flores, supra* 507 US at 304 (bracketed matter added, italics in original). The federal Due Process Clause, then, includes a "substantive component, which forbids the government to infringe certain 'fundamental' liberty interests *at all*, no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest." *Reno v. Flores, supra* 507 US at 302 (emphasis in original). This Court, in *Troxel,* also characterized a fit parent's liberty interest implicated in a visitation case as a "fundamental liberty interest." *Troxel, supra* 530 US at 65-66.

The decision of the Oregon Supreme Court posits that "*Troxel* holds only that the Due Process Clause requires that 'some special weight' be given to the interest of the legal

parent..." in a custody adjudication context (App A-25), but concludes that this Court's plurality opinion "did not elaborate on the nature or extent of the 'weight'". App A-17.

The Oregon Supreme Court's decision concludes that the statutory "*Troxel* fix" at current ORS 109.119 (2) (a) ("that the legal parent acts in the best interest of the child") is all that is required to protect father's Due Process rights. App A-41.

More than just "facial" statutory safeguards are needed to protect the fit parent's fundamental liberty interest. The Oregon Supreme Court failed to apply the statute in such a manner so as to give special weight to this father's child-rearing decisions — to require courts to make findings to provide necessary Due Process contours to the *Troxel* presumption.

A careful reading of this Court's decision in *Troxel,* as well as an examination of current ORS 109.119, reveals that a substantial conflict exists between this Court's admonition in *Troxel* — to give special weight to a fit parent's decision-making — and the Oregon Supreme Court's interpretation of that admonition. The Oregon court erroneously concluded that its application of the state statute provides all the weight needed to be given to "the interest of a parent..." App A-41. It also erroneously concluded that this Court failed to "elaborate on the nature or extent of that 'weight'". App A-17.

The *Troxel* plurality opinion holds that "the court must accord at least some special weight to the parent's own determination," *Troxel, supra,* 530 US at 70; "the Washington Superior Court failed to accord the determination of[] ...a fit custodial parent[] any material weight", *supra,* 530 US at 72, and that the court's "slender findings in combination with the court's announced presumption in favor of grandparents' visitation and its failure to accord significant weight to the [fit parent's offer] of meaningful visitation...", *Id* (bracketed matter and emphasis added), did not comport with Due Process.

This Court's discussion of the weighing of the evidence in *Troxel,* in the context of the application of the statutory parental presumption, does not focus solely upon giving the parent's "interest" a special "statutory" weight. The plurality opinion of *Troxel* focuses, instead, upon the more precise weighing by the fact finder of the parent's specific child-rearing decisions, determinations and actions, especially when the fit parent has custody of his or her children. Determinations of a legal parent are to be given special, significant or material weight by the court, as reflected in its findings. Those child-rearing decisions are given "special weight" when the fact finder makes findings which can be meaningfully weighed against the rebuttal findings.

Secondly, courts are instructed to avoid making "slender findings" which can lead to erroneous infringement of a parent's fundamental right to make child-rearing decisions. *Troxel, supra,* 530 US at 72. Instead, child-rearing decisions of the parent are to be accorded special deference as reflected in the trial court's findings, especially if the parent is found to be fit, as was the case here. *Troxel, supra,* 530 US at 90 ("...I think it safe to assume that trial judges usually give great deference to parents' wishes..."; Stevens, J. dissenting.)

Absent such "*Troxel* findings" the trier of fact has nothing against which to weigh the rebuttal findings, to determine if those rebuttal findings, indeed, preponderate to rebut the parental presumption.

Third, the purpose of the *Troxel* evidentiary procedural safeguards is to prevent the trier of fact from shifting onto a legal and "fit custodial parent, the burden of *disproving* [that custody with the third party] would be in the best interest of [his children]." *Troxel,* 530 US at 69 (bracketed matter added).

Examination of current ORS 109.119 reveals how the

Oregon legislature incorporated the *Troxel* fix in order to make the statute facially constitutional. First, "there is a presumption that the legal parent acts in the "best interest of the child". Current ORS 109.119 (2) (a) (App G-1; emphasis added). The statutory presumption focuses upon the parent's actions or acts in reference to child-rearing decisions involving the child.

Next, the statutory presumption may be rebutted by a preponderance of evidence once the third party establishes a child-parent relationship. Current ORS 109.119 (3) (a) (10) (a). App G-2,5.[2]

Finally, the Oregon statute requires the court to enter findings "supporting the rebuttal of the presumption". Current ORS 109.119 (2) (b) App G-2.

An examination of the Oregon Supreme Court decision reveals how that decision fails to apply the three essential principles enunciated in *Troxel*: (1) findings regarding the fit parent's decisions are to be given special weight; (2) the court is to avoid making "slender findings" based upon speculation; and (3) the court is not to engage in shifting the burden onto the legal parent to disprove that custody with grandparents would

---

2 A lower preponderance evidentiary standard is utilized in conjunction with five non-exclusive substantive rebuttal standards listed at current ORS 109.119 (4) (b). App G-2. The lower evidentiary standard is utilized because the child's liberty interest is implicated to a greater degree once the third party establishes a child-parent ("psychological parent") relationship, as opposed to a mere "ongoing personal relationship," where the third party seeks visitation contact with the child. In the later situation, the third party must rebut the parental presumption by the higher clear and convincing evidentiary burden. Current ORS 109.119 (3) (b) (10) (e). App G-2,5. See, Schuster II, Philip F, "Constitutional and Family Law Implications of the *Sleeper and Troxel* Cases: A Dénouement for Oregon's Psychological Parent Statute? 36 *Will. L. Rev.* 549, 647-658, 661,677-680 (2000; published 2001, hereinafter 36 Will. L. Rev.)

be in the children's best interest.

In the instant case, the Oregon Supreme Court fashioned a new standard of harm, holding that grandparents must demonstrate by a preponderance of evidence that the custodial parent poses a "serious present risk of psychological, emotional or physical harm to the child." (emphasis added). Compare App A-32, with current ORS 109.119 (4) (b) (C) (10) (b).

However, when applying its "serious present risk of harm" standard to the specific facts of this case, the Oregon Supreme Court found that father's circumstances pose only a "serious risk (sic) of psychological or emotional harm to the children" App A -33,34. The Oregon Supreme Court failed to examine whether any present or recent actions or child-rearing decisions by father posed a present serious risk of harm to his children. No special, significant or material weight was given to this fit parent's child-rearing decisions while he had custody of his two children from approximately July, 1999 through July, 2000. Evidence and testimony presented to the trial court demonstrated that father had properly exercised his parental rights in making decisions serving the best interests of his children.[3]

No substantive evidence was offered by grandparents or considered by the trial court demonstrating that father's

---

3 Neither the trial court nor the Oregon Supreme Court entered findings regarding father's solid child-rearing decisions and his lack of danger to the children, as substantiated by independent, credible lay witnesses (App D-11-13) who testified at the trial court hearing (App B-2); Craig Schreiter (father's grief counselor for his children); Officer Sweet (Marion County Sheriff's Deputy); Kathy Harris (trailer home operator); Ms. Zicker (older child's first grade teacher); Dan Wentworth (father's employer); Wende Thomas (father's child care provider); Officer Lyle (Washington County Deputy Sheriff).

decisions were not intended to serve the best interests of his children or that his actions had reflected any lack of love, unconcern for the welfare of his children or unwillingness to provide a good living environment for his children.

No special weight was given to father's decision to continue grief counseling for his children, even when he moved the children from the jurisdiction of Oregon to Montana. App D-12,13.

After father returned to Oregon with his children, no special weight was accorded to father's decision to move from his parent's residence in Mill City to a permanent home in Lyons, Oregon and to remain there. App A-5; App D-4.

No special weight was given to father's decision to enroll his oldest child in school and the fact that his oldest child was doing well in school. App D-11. Likewise, no special weight was given to father's decision to enroll his youngest daughter in daycare and the fact that she was also doing well. App D-11.

No special weight was accorded to father's fostering visitation and close contact with grandparents both before and after he had custody. App A-35,36.

Finally, no special weight was given to the fact that father and his girlfriend are leading a safe, drug free lifestyle. There was no evidence of any physical, psychological or emotional abuse or danger testified to by any of the independent witnesses or by the expert psychologist who did a custody evaluation. App D-12.

Instead, the trial court and the Oregon Supreme Court shifted the burden onto father, a fit custodial parent, to prove to the court that he had somehow overcome his purported deficiencies.

Specifically, father was obliged to "convince" and to "satisfy" the trial court that he had overcome his so-called

shortcomings (Findings 9 and 40; App B-3,9; App A-6), and that his girlfriend had overcome her alleged problems. (Finding 35; App B-8).

Father was obliged to prove to the trial court that father's family was not a "potential threat to the children." (Finding 39) App B-9. Father was obliged to persuade or to convince the trial court that all of the so-called "dangers" that father allegedly presented to the children in the past were no longer present. (Findings 41, 42) App B-9,10.

Father was obliged to "convince" or to persuade the trial court that his temporary removal of the children to Montana for six weeks, depriving grandparents of contact, would no longer occur. (Finding 50) App B-12, App A-37.

Both the trial court and the Oregon Supreme Court found that father failed to carry his burden, despite the fact that he did not remove the children while he had physical custody for over a year prior to the trial court hearing, and despite the fact that the trial court had ample jurisdiction to order a parenting plan restricting father from removing the children from the state, had father been originally awarded custody. See, removal provision in parental plan order at App B-22.

The Oregon Supreme Court's justification for grandparents' rebuttal of the parental presumption, and award of custody to grandparents, relies on the kind of "slender" fact-finding disapproved by this Court in *Troxel.* Those findings rely upon a single, brief (six-week) removal by father of the children from the jurisdiction of Oregon to Montana. Father promptly obeyed the court's order to return to Oregon. App D-4. No consideration was given to father's reasons for leaving the jurisdiction in the first place, given the context of the acrimonious custody dispute with grandparents (Findings 25-27; App B-6,7), sparked by a prior *ex parte* order giving them custody, an order which was subsequently vacated. App B-7.

The trial court's slender findings, adopted by the Oregon Supreme Court, also rely upon speculation or upon remote circumstances — supposedly illustrating the shortcomings of father, father's girlfriend and father's extended family — prior to the time that father had physical custody of his children. The trial court and Oregon Supreme Court speculated that the children had been and would continue to be emotionally and psychologically harmed by their inability to routinely associate with grandparents if father were awarded custody. In making these slender, subjective findings, the Oregon Court failed to weigh the relative harm to the children and to father resulting from his sudden loss of custody of the children.

Although, on *de novo* review, the Oregon Supreme Court gives considerable weight to the trial court's findings of fact and credibility (App A-3), neither the trial court nor the Oregon Supreme Court made any findings giving "special weight" to the decisions of father. Unlike the Court of Appeals (App D-11-13), neither the trial court (App B) nor the Oregon Supreme Court (App A-3-5) made any findings of fact in accordance with independent testimony which demonstrated father's positive child-rearing decisions.[4]

While the custody evaluator concluded that father is able to adequately care for his children (App A-30), the trial court found that father and father's family posed a potential, if not sufficient, danger. Findings 39 and 42; App B-9,10. These speculative or "slender" findings were based upon more remote circumstances and upon the expert's across-the-board use of a best interest custody evaluation. As mentioned, this evaluation was given less weight in the context of the *Troxel* holding (App

---

4 See footnote 3, *supra* at p.18

D-10, note 9), in that it "relied on the wrong standard,...." App E-7 (note 3).

This Court has previously held that such an overall custody adjudication procedure, which precludes the determinative issues of a parent's ability to raise and care for his or her child, cannot stand:

> "Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issues of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand."

Stanley, supra, 405 US at 656-657 (emphasis added).

Here, the weightier "*Troxel* findings" made by the Oregon Court of Appeals (App D-11-13)[5] — which reflected "present realities" while this father had custody — were never weighed against the rebuttal findings of the Oregon Supreme Court. Consequently, the more "slender" rebuttal findings were applied to deprive this father of custody of this two children, in violation of his guarantees to substantive and procedural Due Process.

III. To secure and stabilize parental rights and relationships with children in third-party custody cases, this Court should supplement the *Troxel* standard with the dominant opinion and contemporary practices of

---

5 See, findings listed herein, *supra* at pp. 5-6

the fifty states, which require either a showing of unfitness or a showing of exceptional or extraordinary circumstances detrimental to the child to rebut the *Troxel* parental presumption.

This Court in *Troxel* cautioned that the quantum of harm or potential harm necessary to rebut the parental presumption is "best 'elaborated with care'" by the states "on a case-by-case basis". *Troxel, supra,* 530 US at 73. This admonition highlights that substantive rebuttal standards as well as evidentiary standards, utilized in conjunction with the *Troxel* presumption, do matter. State courts must take heed in applying the substantive and evidentiary standards in order to give their application a presumption of validity under the Due Process Clause.

Notwithstanding the finding by all the courts below that father was a fit parent, current ORS 109.119 (4) (b) (A), (see App A-29-30; App D-10; App B-9), the Oregon Supreme Court concluded that grandparent's had rebutted, by a preponderance of evidence, the presumption that father acts in the best interest of the children by considering each of the remaining statutory rebuttal factors when taken "as a whole". App A-28,38. The Oregon Supreme Court placed particular emphasis on three of the substantive rebuttal standards: grandparents' role as primary caretakers to the children after mother's death; father's denial of contact between the children and grandparents by moving the children to Montana for six weeks; and the alleged serious risk of psychological or emotional harm to children posed if father were granted custody. Current ORS 109.119 (4) (b) (B) (C) (E). App A-30-37. The Oregon court held that these circumstances, "when taken as a whole, rebut[] the presumption." App A-38.

In analyzing what process is due a fit custodial parent

when current ORS 109.119 is applied to the facts of this case, the methodology of this Court established in *Mathews v. Eldridge*, 424 US 319, 335 (1976) proves helpful.

First, consideration is given to the private interests at stake which are implicated by the statute, current ORS 109.119. Father, as a fit custodial and legal parent, enjoys a weighty and fundamental interest in the care, custody and control of his children. *Troxel, supra,* 530 US at 65-66 "The private interest here, that of a man in the children he has sired and raised, undeniably warrants deference and, absent a powerful countervailing interest, protection...[and] 'come[s] to this Court with a momentum for respect'....." *Stanley, supra*, 405 US at 651.

The children's liberty interest is conjoined with the state's interest as *parens patriae* to safeguard its children within its jurisdiction. *Stanley, supra*, 405 US at 652. See, also *Schuster, supra* 36 Will. L. Rev. at 647-657. The parent's liberty interest is embodied in the *Troxel* presumption and the statute's employment of heightened substantive rebuttal criteria at current ORS 109.119 (4) (b). App G-3. The child's liberty interest is balanced with the parent's interest and is embodied by the lower preponderance evidentiary standard utilized to rebut the *Troxel* presumption. Current ORS 109.119 (3) (a). The child's interest is also implicated by the statutory child-parent relationship. Current ORS 109.119 (10) (a). Both the parent's and the child's liberty interests outweigh the statutorily-defined intervenor interest of grandparents in this case.

The second *Mathew's* test is the risk of erroneous deprivation occasioned by the Oregon Supreme Court's fact-finding methodology in applying the rebuttal factors at current ORS 109.119 (4) (b). *Supra*, 424 US at 335 The risk of erroneously depriving a fit custodial parent of his children by

employment of this "evidence-as-a-whole" weighing methodology is enormous.

First, the Oregon Supreme Court found father, here, to be "fit" – that "father plainly is willing to care for the children,..." as substantiated by "the report and testimony of the court appointed psychologist,...." App A-30 (emphasis added). This finding contradicts and is completely inconsistent with the court's general finding that father, somehow, poses a "serious present risk of psychological or emotional harm" to the children. App A-33 (emphasis added).

Most troublesome, however, is the Oregon Supreme Court's holding that "the evidence in support of each identified factor (and any other evidence relevant to rebutting the presumption), when taken as a whole, rebuts the presumption." (emphasis added) App A-38.

A proper Due Process analysis of this evidence-weighing rule involves consideration of the probable value of additional or substitute procedural safeguards. *Mathews, supra*, 424 US at 335.

In fashioning this evidence-weighing rule, the Oregon court grappled with the difficult task of balancing the parent's fundamental liberty interest in the care, control and maintenance of his children with the liberty interest of the children, while minimizing the risk of erroneously depriving the children of a safe, nurturing environment.

Since we do not live in a perfect world, children are likely to be exposed to some quantum of harm, whether they live with their parents, no matter how adequate the parental care. See e.g. *Clark v. Wade,* 544 SE 2nd 99, 107-108 (Ga 2001) ("...[T]he death of a parent, divorce or a change in home or school, will often be difficult for a child, but some level of stress or discomfort may be warranted when the goal is reunification of the child with the parent."). "...[E]ven a fit

parent is capable of treating a child like a mere possession." *Troxel, supra* 530 US at 86 (Stevens J, dissenting).

It is therefore important that where the legal custodial parent is found to be "fit", that the statute provide an alternative "safety valve" procedure to reduce the risk of erroneously depriving the child of a safe, nurturing environment.

Significantly, *Troxel* and other decisions of this Court instruct us that such a "safety valve" rebuttal showing will "normally" not be made. *Troxel*, supra 530 US at 68. "Our cases leave no doubt that parents have a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest — absent exceptional circumstances — in doing so without the undue interference of strangers to them and to their child." *Supra* 530 US at 87. (Stevens J., dissenting; emphasis added). Moreover —

> "We have little doubt that the Due Process Clause would be offended '[i]f a State were to attempt to force the breakup of a natural family, over the objections of the parents and their children, without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest.'"

Quilloin v. Walcott, 434 US 246, 255 (1978)

The issue, then, is whether or not the "individual interests at stake" in this psychological parent custody proceeding — here, a fit custodial father's interests — "are both particularly important and more substantial" than the other statutory rebuttal factors when "taken as a whole." *Santosky v. Kramer,* 455 US 745,756 (1982). May these other rebuttal criteria, when simply "taken as a whole," constitutionally overcome the *Troxel* presumption, where a lower preponderance evidentiary standard favors the child's interest? Guidance is necessary to give the fact finder "'the degree of

confidence our society thinks he should have in the correctness of factual conclusions for'" these psychological parent custody adjudications. *Addington v. Texas*, 441 US 418, 423 (1979).

In order to properly evaluate the permissible Due Process contours of such a substitute rebuttal "safety valve", this Court has established a constitutional principal in *Rivera v. Minnich*, 483 US 574, 578 (1987) which assists our analysis:

> "A legislative judgment that is not only consistent with the 'dominant opinion' throughout the country but is also in accord with 'the traditions of our people and our law' (citation omitted), is entitled to a powerful presumption of validity when it is challenged under the Due Process Clause of the Fourteenth Amendment"

This "dominant opinion" principal involves an examination of the "dominant opinion" of legislative enactments and judicial opinions which are "in accord with 'the traditions of our people and our law.'" The Court looks to "history and contemporary practices" to determine whether procedural standards comport with Due Process. *Connecticut v Doehr*, 501 US 1, 23 (1991)

Besides *Rivera,* this Court has utilized the "dominant opinion" principal to assist it in deciding whether or not other statutory standards, such as the quantum of proof or rebuttal standards, appropriately comport with the Due Process Clause. *Rivera, supra* 483 US 578 (noting that a majority of American jurisdictions employ the preponderance of evidence standard in paternity litigation); *Santoski, supra* 455 US at 749-750 (utilizing this "mainstream" principal in adopting a clear and convincing statement of proof in termination of parental rights proceedings); *Addington v. Texas, supra* 441 US at 431-432 (utilizing the principal to establish the clear and convincing minimum burden of proof in mental commitment proceedings).

The *Troxel* plurality opinion also utilized this principal to illustrate that the Washington trial court's methodology in weighing the fit parent's visitation decisions did not comport with federal Due Process. *Troxel, supra* 530 US at 70-72.

An examination of the mainstream or "dominant opinion" of the fifty state jurisdictions throughout our Nation which employ rebuttal criteria to overcome the parental or *Troxel* presumption should assist this Court. The fifty-state survey indicates that, by far, the largest percentage of states require either a showing of unfitness or a showing of exceptional or extraordinary circumstances detrimental to the child's interest, in order to rebut the *Troxel* presumption. See App H-1-4.

A Due Process problem arises where a weak "safety valve" rebuttal standard is utilized in conjunction with the lower "preponderance" evidentiary standard.

The Oregon Supreme Court employs an amorphous "totality of evidence" test, linked with the lower preponderance of evidence standard, for rebutting the *Troxel* presumption. Where father, here, was found to be "fit", application of such a procedural method does not pass federal Due Process muster for several reasons. First, the "dominant opinion" in the Nation, which is given a strong Due Process presumption of validity, reveals that once a parent is found to be "fit", in order to rebut the parental presumption, the evidence of other non-exclusive rebuttal factors must preponderate to show a totality of "extraordinary or exceptional circumstances." Such heightened scrutiny, employing a higher substantive rebuttal showing, will minimize the risk of erroneously depriving a fit parent of his or her fundamental liberty interest as well as erroneously depriving the child of parental companionship.

Secondly, the enormous risk of erroneous deprivation by failing to utilize a heightened "safety valve" showing is

illustrated by the decision of the Oregon Supreme Court. The totality of rebuttal evidence, when taken "as a whole" — and affording father's child-rearing decisions, while he had custody, the special weight they deserve[6] — does not come anywhere near constituting "extraordinary or exceptional circumstances" such as to justify rebuttal of the *Troxel* presumption.

The third *Mathews* test involves consideration of the fiscal and administrative burdens imposed upon the State by private third-party custody adjudications made pursuant to the Oregon statute, current ORS 109.119, and applying the evidence-weighing rules of the Oregon Supreme Court's decision. *Mathews, supra,* 424 US at 335. This third test involves consideration of the state's dual interest as *parens patriae* to safeguard children within its jurisdiction, while protecting the integrity of the family unit.

The state's dual interest becomes less weighty when the State is not a party to a private, third-party custody proceeding, as opposed to a juvenile or termination of parental rights proceeding. Obviously, if custody with a legal parent poses "extraordinary or exceptional circumstances", there is an available and involved custodian (private third-party), rather than the more impersonal State.

On the other hand, the state's interest in fashioning its statute to protect a parent's fundamental liberty interest, while ensuring that it is properly applied, is important. At stake is the enormous fiscal impact of misapplication of statutory rebuttal standards during third-party litigation in the state court system. Here, the Oregon Supreme Court concluded that this Court in *Troxel* left "undefined" the "less exacting standard" for heightened scrutiny of state actions that intrude upon a parent's

---

6 See discussion, *supra* at pp. 18-19

fundamental liberty interest. App A-17. Clarification is therefore needed to define with more exactness the heightened scrutiny necessary where a fit custodial parent's fundamental liberty interest is implicated in a private, third-party custodial adjudication.

This Court in *Troxel* cited with approval *Reno v. Flores, supra,* which sets forth the lowest parameter of heightened scrutiny — the "reasonable fit" test: "a 'reasonable fit' between the governmental purpose...and the means chosen to advance that purpose." *Supra* 507 US 305. At the other end of the heightened scrutiny spectrum is the strict scrutiny test advanced by Justice Thomas in his concurring opinion in *Troxel, supra* 530 US at 80.

In failing to achieve even a "reasonable fit" for father's weighty fundamental liberty interest, the Oregon Supreme Court's decision accomplishes precisely what this Court said would offend the Due Process Clause: it forces the breakup of a fit custodial parent from his two children without a showing of unfitness and for the sole reason being the children's best interest. *Quilloin v Walcott, supra* 434 US at 255.

A bright line, nationally uniform substantive "safety valve" rebuttal standard (where the legal parent is found to be fit) will make state court "psychological parent" custody disputes far less expensive and time consuming.

Substantive and procedural Due Process require that a strong presumption of Due Process validity be accorded the Nation's "dominant opinion": where a legal parent is found to be fit, other detrimental circumstances preponderating to rebut the *Troxel* or parental presumption must rise to the heightened level of "extraordinary or exceptional circumstances."

CONCLUSION

The Court should grant the Petition for Writ of Certiorari and reverse the decision of the Supreme Court of the State of Oregon.

Respectfully submitted
Dierking & Schuster

Philip F. Schuster, II
3565 NE Broadway
Portland, OR 97232